



22  
No. 1149

In the Supreme Court of the United States

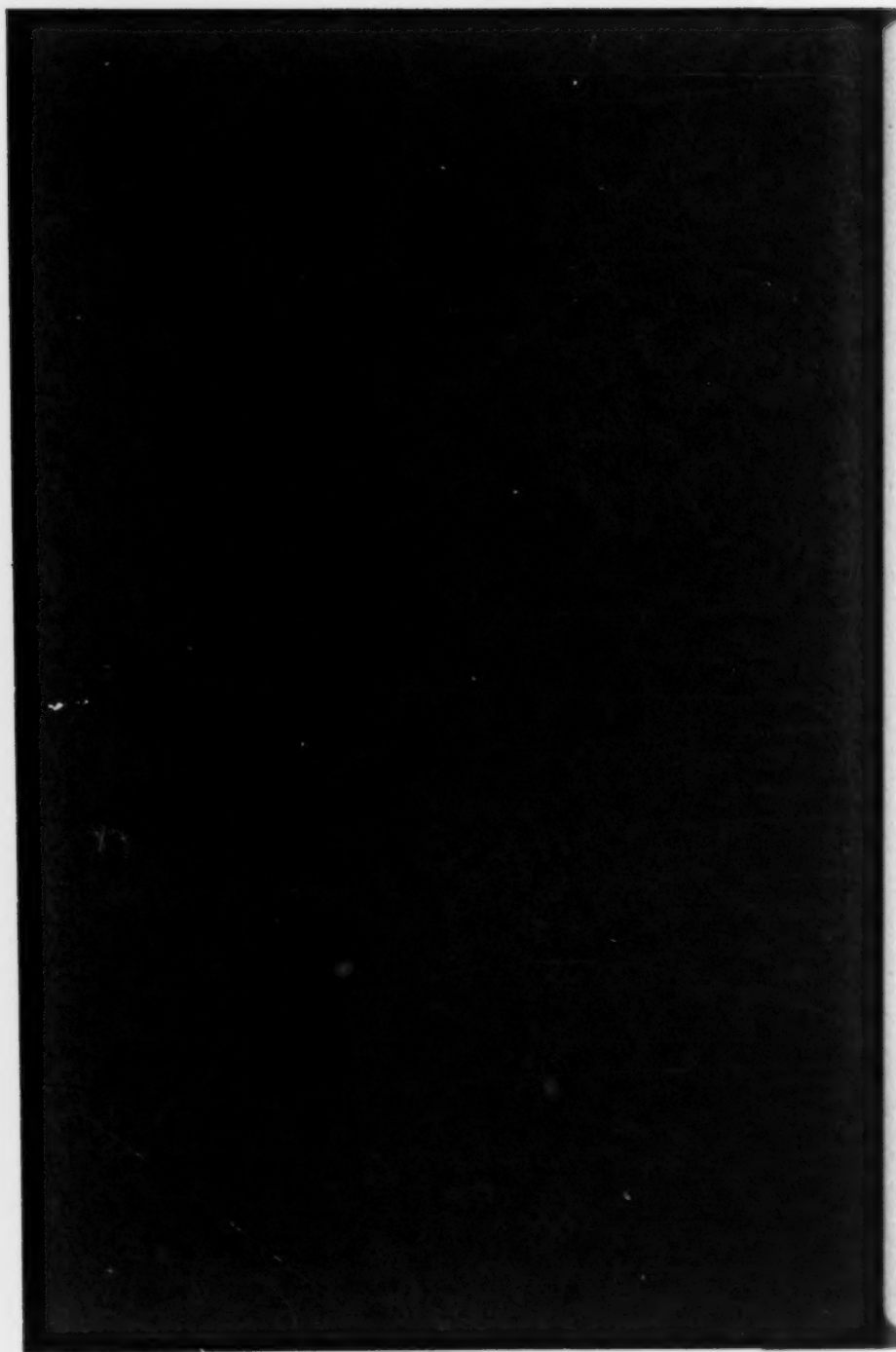
October Term, 1945

LOUIS BROWDER, PETITIONER

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF HABEAS CORPUS TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES OF AMERICA



## INDEX

---

	Page
Opinions below .....	1
Jurisdiction .....	1
Question presented .....	2
Statute involved .....	2
Statement .....	3
Argument .....	9
Conclusion .....	12

### CITATIONS

#### Cases:

<i>Clarke v. United States</i> , 132 F. 2d 538, certiorari denied, 318 U. S. 789 .....	10
<i>Hallowell v. United States</i> , 253 Fed. 865, certiorari denied, 249 U. S. 615 .....	10
<i>Kann v. United States</i> , 323 U. S. 88 .....	10
<i>Shreve v. United States</i> , 103 F. 2d 796, certiorari denied, 308 U. S. 570 .....	10
<i>Spivey v. United States</i> , 109 F. 2d 181, certiorari denied, 310 U. S. 631 .....	10
<i>United States v. Cohen</i> , 145 F. 2d 82, certiorari denied, 323 U. S. 799 .....	10

#### Statute:

Criminal Code, Sec. 215 (18 U. S. C. 338) .....	2
---	---



# In the Supreme Court of the United States

OCTOBER TERM, 1945

---

No. 1149

LOUIS EPSTEIN, PETITIONER

v.

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT*

---

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

---

## **OPINIONS BELOW**

The opinion of the circuit court of appeals (R. 483-490) has not yet been reported. The opinion of the district court denying petitioner's motion to dismiss at the close of the Government's case appears at pages 439-445 of the record.

## **JURISDICTION**

The judgment of the circuit court of appeals was entered March 26, 1946 (R. 491). The petition for a writ of certiorari was filed April 23, 1946. The jurisdiction of this Court is invoked

under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a) of the Federal Rules of Criminal Procedure, effective March 21, 1946.

**QUESTION PRESENTED**

Whether the evidence is sufficient to establish that the mailings charged in the indictment were in execution of the scheme to defraud in which petitioner was associated.

**STATUTE INVOLVED**

Section 215 of the Criminal Code (18 U. S. C. 338) provides in pertinent part as follows:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, \* \* \* shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to

be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than \$1,000, or imprisoned not more than five years, or both.

#### STATEMENT

An indictment in six counts was returned against petitioner and three others in the District Court for the Southern District of New York, charging use of the mails in execution of a scheme to defraud various factors by the kiting of checks, securing the discounting of notes falsely alleged to represent the purchase price of motion picture equipment, and false representations respecting purported contracts for the sale of motion picture machines to the United States Government (R. 2-13). Petitioner waived a jury trial and was tried alone (R. 17). He was convicted on five of the six counts,<sup>1</sup> and sentenced to imprisonment for one year and one day on each, the sentences to run concurrently (R. 463). On appeal to the Circuit Court of Appeals for the Second Circuit, the judgment was affirmed (R. 491).

The evidence for the Government may be summarized as follows:

---

<sup>1</sup> The second count was dismissed on the Government's motion (R. 431).

Wilfred Cohen, one of the defendants named in the indictment, had been borrowing money from another defendant, Sussman, paying him interest at the rate of six percent per week (R. 19-22). In January 1942, Sussman introduced petitioner to Cohen, stating that petitioner was the man from whom he had obtained some of the money he had loaned Cohen (R. 18). Cohen showed petitioner a motion picture machine owned by Spotlight Productions, Inc., a corporation owned by Cohen (R. 16, 22).

Subsequently, petitioner, Cohen, and Sussman met to discuss the form of loans to Cohen (R. 23). Cohen told petitioner that he could not discount notes made by petitioner and Sussman with factors unless he could produce evidence of the purpose for which the notes were taken (R. 24, 25). Petitioner suggested chattel mortgages on motion picture machines as security for the notes, but Cohen convinced him that conditional bills of sale would be more feasible (R. 216-217). Petitioner agreed that, if an investigation were made, he would state that he had purchased machines from Cohen (R. 25).

Thereafter, petitioner and Sussman executed promissory notes to Cohen's order and also signed fictitious purchase orders for motion picture equipment, conditional bills of sale, and estoppel certificates stating that the notes were genuine and incontestable (R. 25-27). Cohen discounted

these notes with various factors (R. 28). He agreed to pay petitioner and Sussman \$400 each per \$10,000 worth of notes used (R. 27-28).

In May 1942, Cohen arranged for a similar group of loans through petitioner and Sussman by the same device of notes for fictitious sales of motion picture equipment (R. 30-32). Cohen told petitioner that he intended to use the proceeds of these notes to pay off the notes previously signed by petitioner and Sussman (R. 30). Petitioner suggested to Cohen a factor who might be willing to discount notes at a lower rate than Cohen was paying (R. 31).

This process was constantly repeated for the next sixteen months, the amount of the notes increasing each time (R. 58-59, 60-61, 63-64, 66-68, 71-72, 74-75, 77, 94-104, 113-114, 354). After August 1942, conditional bills of sale were not used, but estoppel certificates were signed (R. 107, 116-118, 120-121, 130, 132-136, 138, 159, 162-164, 167-168). Still later, at Cohen's request, the form of the notes was changed to have a corporation dominated by Sussman as maker and Sussman and petitioner as endorsers, or Spotlight Productions as maker and Sussman and petitioner as endorsers (R. 171-172, 173-175, 178). In all, the notes signed or endorsed by petitioner and Sussman totaled \$700,000, of which \$127,790 remained unpaid in December 1943 (R. 346).

In some instances factors had their own forms of estoppel certificates and, when Cohen so informed petitioner and Sussman, they executed such forms (R. 51-54). At Cohen's request, petitioner mailed such an estoppel certificate to a factor (R. 64-65).

During the period that the notes were being discounted, Cohen also arranged with petitioner to use a bank account of petitioner's corporation, the New Union Square Hotel Corporation, for the purpose of "kiting" checks. Cohen at first paid petitioner \$50 for each \$5,000 worth of checks drawn. Subsequently, he paid petitioner \$100 per week, and later \$150 per week for the use of the account. (R. 78-89, 90-92, 122-131, 137, 143-144, 188-189, 267.)

In November 1942, Lectern Service, which had been discounting notes signed by petitioner and Sussman on Cohen's representations that the notes were given for the purchase of machinery (R. 321-323), and which then held obligations amounting to approximately \$25,000 in the form of notes, Union Square Hotel Corporation checks, and Cohen checks (R. 415-416), refused to discount further obligations of this character (R. 415). Accurate Factors, another company which had been discounting notes signed by petitioner and Sussman in the belief that they represented the purchase price of machinery (R. 371), had fixed \$5,000 as the maximum amount of such

notes which it would discount (R. 372). In January and February 1943, Cohen told these factors that he would give them assignments of money allegedly due him from the Treasury Department of the United States for motion picture equipment sold in connection with war bond sales. He produced false invoices of sales from Spotlight Productions to the Treasury Department and forged letters of confirmation on official stationery of the Treasury Department. (R. 147-154, 386-387.) He stated that the Treasury Department was to make payment through the American Railway Express upon the delivery of machines to the express company, and he displayed to the factors express company checks procured by sending "dummy" packages by express c. o. d. and paying therefor at the point of delivery (R. 392-394, 399). The "count letters" were all forged Treasury confirmations mailed by Cohen to Spotlight Productions (count 1, Ex. 31, R. 149-150, 457; count 3, Ex. 32, R. 150-151, 458; count 4, Ex. 33, R. 152, 459; count 5, Ex. 34, R. 152, 460; count 6, Ex. 35, R. 152, 461). On the basis of the fictitious assignments of money due from the Treasury, both Accurate Factors and Leetern Service continued to lend considerable sums of money to Cohen during 1943 (R. 148, 154, 156-158).

During the period that Cohen was obtaining money on forged Treasury confirmations, he con-

tinued to discount notes endorsed by petitioner and Sussman (R. 159, 162, 163-164, 167-168, 170-171, 178, 180-181, 384, 387). Such notes were accepted during this period by both Accurate Factors and Lectern Service, the two factors who were taking the fictitious assignments of Treasury obligations (R. 384-385, 418-420).

In August 1943, Cohen told petitioner that some of the notes petitioner had endorsed would not be paid (R. 195). Petitioner at first stopped payment on the specific notes which Cohen told him would be defaulted. Subsequently he stopped payment on all except those Cohen said he would pay off. (R. 277-278.) Petitioner told an official of his bank that he was stopping payment on one of the notes because he expected new machines (R. 334-335). He had previously told this official that he was interested in the motion picture business (R. 336). In October 1943, petitioner loaned Cohen \$10,000, receiving in exchange post dated checks for \$16,000 (R. 198-199). Later, petitioner gave Cohen \$7,000 which was to be repaid at the same ratio of 8 to 5 (R. 200).

Some time in November 1943, Cohen told petitioner and Sussman that if he did not raise \$100,000 there would be trouble (R. 202, 204); that there was "a criminal angle," because of "these phoney bills and everything" (R. 204). He also said that a post office inspector had been

trying to reach him (R. 204). Sussman stated that he had not personally mailed "the letters," and petitioner remained silent (R. 204-205).

Cohen testified that during the period up to October 1943, he had not told petitioner that he had any business dealings with the Treasury or that he was obtaining money on the basis of false Treasury letters (R. 155, 433-434).

#### ARGUMENT

Petitioner urges (Pet. 2, 9-12) that, in view of Cohen's testimony that he did not inform petitioner of the fraudulent Treasury letters, the evidence is insufficient to support petitioner's conviction for the mailing of the forged Treasury letters charged in the indictment. This contention was carefully considered and rejected by both the district court (R. 443-445) and the circuit court of appeals (R. 486-489) on the ground that the Treasury letters were merely part of a general scheme contemplating the use of the mails to which petitioner was a knowing party.

We submit that the decisions below are correct. It is a well established principle of mail fraud law that one who becomes a party to a scheme to defraud which may reasonably be anticipated to involve the use of the mails is liable for mailings performed or caused by his confederate in execution of the scheme, even though he may not have been aware of the specific use of the mails

which forms the basis of the indictment. *Kann v. United States*, 323 U. S. 88, 93; *United States v. Cohen*, 145 F. 2d 82, 90 (C. C. A. 2), certiorari denied, 323 U. S. 799; *Clarke v. United States*, 132 F. 2d 538, 540 (C. C. A. 9), certiorari denied, 318 U. S. 789; *Spivey v. United States*, 109 F. 2d 181, 184 (C. C. A. 5), certiorari denied, 310 U. S. 631; *Shreve v. United States*, 103 F. 2d 796, 813 (C. C. A. 9), certiorari denied, 308 U. S. 570; *Hallowell v. United States*, 253 Fed. 865, 868 (C. C. A. 9), certiorari denied, 249 U. S. 615.

There can be no question that, in this case, petitioner was a party to a scheme which contemplated the use of the mails, for he himself agreed to and did send through the mails an estoppel certificate required by one of the factors (p. 6, *supra*). The only issue before the trial court on this aspect of the case, therefore, was whether petitioner joined a scheme limited to the particular transactions in which he directly participated, or whether he was a party to the general scheme to defraud charged in the indictment. We think that on the evidence the courts below were warranted in finding that petitioner had so tied himself to Cohen's plans and that the false Treasury assignments were so integral a part of the scheme in which petitioner had associated himself that he must be considered *particeps criminis* as to all phases of the scheme.

Petitioner's willingness to do whatever Cohen suggested in order to further the fiction that Cohen was an active, successful businessman is apparent. He deferred to Cohen's request that the notes to be discounted be supported by fictitious bills of sale rather than chattel mortgages. He allowed Cohen to use his corporate checking account to "kite" checks in any amount. He signed any form of estoppel certificate which was presented to him. When Cohen decided that corporate notes with petitioner and Sussman as endorsers were better than notes with petitioner and Sussman as makers, petitioner acceded without question to Cohen's request for a change of form.

Furthermore, the success of the Treasury assignment aspect of the scheme was made possible by the fact that the prior fictitious sales to petitioner and Sussman had given Cohen's transactions the appearance of business activity. At the same time, the money secured by assigning the fraudulent Treasury obligations enabled Cohen to continue operations and made possible further issuance and discount of notes endorsed by petitioner and Sussman during the same period. In one instance, Cohen used \$25,000 in notes signed by petitioner to redeem fictitious Treasury obligations on which payment was allegedly delayed by the Federal Government (R. 419-421). The Treasury obligations were thus part of Cohen's whole scheme of financial juggling, a scheme which peti-

tioner had knowingly joined and in which he had actively participated. Considered in narrower compass, the Treasury obligations were a device to prevent discovery and to permit continued operation of the particular scheme with which petitioner was unquestionably associated, the scheme to keep Cohen in a financial position to use petitioner's endorsements on notes for a price. Under the circumstances, therefore, petitioner was properly held liable for the mailings charged in the indictment.

#### CONCLUSION

The decision below involves merely the application of well established principles of law to the particular facts of this case, and presents no question requiring further review by this Court. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

J. HOWARD McGRATH,  
*Solicitor General.*

THERON L. CAUDLE,  
*Assistant Attorney General.*

ROBERT S. ERDAHL,  
BEATRICE ROSENBERG,  
*Attorneys.*

MAY 1946.

